

G-008/C-91-942 ORDER SEVERING MINNEGASCO FROM THE INVESTIGATION
DOCKET, GRANTING DISCOVERY RIGHTS, REQUIRING REPORT AND
AUTHORIZING COMMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Cynthia A. Kitlinski
Dee Knaak
Norma McKanna

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint
of the Minnesota Alliance for
Fair Competition Against
Minnegasco, a Division of Arkla,
Inc.

ISSUE DATE: January 29, 1992

DOCKET NO. G-008/C-91-942

ORDER SEVERING MINNEGASCO FROM
THE INVESTIGATION DOCKET,
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PROCEDURAL HISTORY

I. Proceedings to Date

A. Docket No. G-009/PA-90-604

On September 14, 1990, the Commission issued its ORDER ESTABLISHING PROCEDURES AND DENYING PETITION TO INTERVENE in Docket No. G-009/PA-90-604, In the Matter of the Proposed Merger of Minnegasco, Inc. with and into Arkla, Inc.. In that docket, the Minnesota Alliance for Fair Competition (MAC), a trade organization of plumbing, electrical and appliance associations, alleged that Minnegasco's regulated utility operations unfairly subsidize its unregulated appliance sales and service business, to the detriment of MAC's members. In the September 14 Order, the Commission found that MAC's concerns should be addressed outside of the Minnegasco/Arkla merger docket.

B. Docket No. G,E-999/CI-90-1008

On January 4, 1991, the Commission issued its ORDER INITIATING INVESTIGATION AND REQUIRING REPORT in the current docket. In that Order the Commission found that issues regarding unregulated appliance sales and service by regulated utilities merited further investigation. The Commission directed the Department of Public Service (the Department) to initiate an investigation of the appliance sales and service practices of all Minnesota gas and electric utilities. The Department was instructed to file a report of its investigation with the Commission within 60 days.

The Commission met to consider the Department's report and parties' comments on April 25, 1991. At the meeting, MAC presented a twelve-minute videotape to the Commission. The videotape purported to show actions by various utility employees which MAC alleged constituted an unfair relationship between the utilities' regulated and unregulated entities. In one instance, the videotape showed an incident in which a Minnegasco sales representative seemed to link preferential regulated utility service with patronage of Minnegasco's unregulated sales and service department.

On May 6, 1991, the Commission issued its ORDER REQUIRING FURTHER FILINGS IN INVESTIGATION. In that Order the Commission expressed concern regarding the allegations of utility cross-subsidization and impropriety raised by MAC. The Commission granted any interested party the right to examine MAC's videotapes and transcripts upon filing a request.

After the parties had examined MAC's material, the Commission issued a Notice of Comment Period. The Department and the Residential Utilities Division of the Office of Attorney General (RUD-OAG) filed comments on June 18, 1991. From June 5, 1991, through June 20, 1991, comments were filed by Minnegasco, Minnesota Power, Northern States Power Company, Peoples Natural Gas Company, Midwest Gas Company and Great Plains Gas Company.

Reply comments were filed on July 9, 1991 by MAC, the Department, and Minnegasco.

On August 28, 1991, the Commission issued an Order requiring each utility to file cost separation data and a proposed customer brochure explaining the differences between its regulated and unregulated services. The Commission noted that only one apparently discriminatory conversation was shown on the videotape and that no complaint had been filed by MAC or any other party regarding Minnegasco's alleged discriminatory treatment. On the basis of the record before it at that time, the Commission concluded that it would not refer Minnegasco or any other utility for further investigation. At the same time, the Commission expressed concern regarding the implications of possible discrimination and stated that the use of a regulated utility service in a preferential manner would be directly against Commission and public policy. The Commission warned each utility to guard against any such practice and urged any party who may become aware of a discriminatory utility practice to report any such incident to the Commission in a formal complaint.

C. Docket No. G-008/C-91-942

On November 27, 1991, MAC filed a formal complaint with the Commission against Minnegasco. MAC requested discovery rights and a formal hearing on its complaint.

On December 16, 1991, Minnegasco filed a formal answer to MAC's complaint.

On December 26, 1991, MAC filed a response to Minnegasco's answer.

On December 27, 1991 the Department submitted its comments on the complaint and on January 10, 1992 the Residential Utilities Division of the Office of the Attorney General (RUD-OAG) filed its comments.

On January 15, 1992, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

II. The Parties

Minnegasco, a Division of Arkla, Inc. (Minnegasco), is a major investor-owned natural gas utility in Minnesota. Its operations as a gas utility are subject to regulation by the Commission. Minnegasco also has various non-regulated business operations, including an Appliance Sales and Service group which sells and services appliances.

MAC is an association of Minnesota appliance dealers and service providers, electrical contractors, heating and cooling contractors, mechanical contractors, plumbing contractors, and sheet metal contractors. MAC's members compete with Minnegasco in the sales, installation, and service of appliances and heating and cooling systems.

III. MAC's Complaint

In its complaint, MAC makes three charges: 1) that Minnegasco subsidizes its appliance sales and service programs (non-utility, non-regulated operations) through its regulated operations; 2) that Minnegasco offers preferential treatment to ratepayers who purchase Minnegasco's appliance sales and service; and 3) that Minnegasco has used its appliance inspection activity (regulated) to manipulate purchases of Minnegasco appliances (non-regulated). In this Order, these charges are referred to as 1) subsidization, 2) preferential treatment, 3) abuse of inspection role.

A. Subsidization

MAC detailed its subsidization claim by alleging that Minnegasco uses the utility's name and good will, information, and personnel to promote and operate its non-regulated appliance sales and service programs without adequately compensating the utility. As

a result, according to MAC, expenses that should be borne by Minnegasco's non-regulated operation are borne by the ratepayers. MAC supplied several exhibits in support of this claim.

B. Preferential Treatment

MAC alleged that Minnegasco threatens to withhold or delay installation of gas service to new customers who do not purchase their appliances from the utility and offers preferential treatment for those who do. MAC supplied two exhibits in support of that claim. Exhibits #1 and #2.

C. Abuse of Inspection Role

MAC alleged that in the course of responding to customer calls regarding gas leaks and furnace malfunctions Minnegasco inspectors (regulated) have misrepresented the safety of customers' furnaces in an attempt to induce the customers to purchase a new furnace from Minnegasco's appliance sales operation (unregulated). MAC supplied two exhibits in support of this charge. Exhibits #8 and #9.

IV. Commission Analysis and Action

At this stage of evaluating MAC's complaint, the Commission is not prepared to determine the merits of MAC's allegations. Instead, the Commission will decide 1) whether the Commission has jurisdiction over MAC's allegations, 2) whether the complaint is sufficient as to form, and 3) what process the Commission should afford these allegations.

A. Commission Jurisdiction

The Commission has jurisdiction under Minn. Stat. §§ 216B.08 and 216B.17 (1990) over actions or omissions of a regulated utility such as Minnegasco which may harm ratepayers or interfere with the delivery of utility service. This authority extends to the relationship between a regulated utility and its unregulated operations. The Commission has broad responsibilities regarding the subject matter of MAC's complaint and authority to grant the relief that MAC has requested, with the possible exception of requiring Minnegasco to refund the amount it received from Mr. and Mrs. Holzinger. That MAC characterizes the activity as "fraud" in its complaint is immaterial and does not withdraw it from Commission jurisdiction as the Department asserts. As an alleged harm to a customer in connection with provision of gas utility service, the Commission has jurisdiction over it. Minn. Stat. § 216B.17, subd. 1 (1990). The extent of the Commission's remedies to redress such an activity, if it is shown to have occurred, need not be decided at this time.

In sum, the Commission is concerned by the allegations made in MAC's complaint and will exercise its jurisdiction over these matters. The Commission will proceed in the manner specified in this Order.

B. Form

Minnegasco and the Department raised concerns about the form of MAC's complaint. Minnegasco and the Department argued that MAC's complaint was defective for failure to verify all facts alleged under oath, as required by Minnesota Rules, part 7830.1700.

Serious allegations in MAC's complaint that Minnegasco has subjected some of its utility customers to an unreasonable preference or disadvantage under Minn. Stat. § 216B.07 (1990) are not supported by sworn affidavits. Out of concern to reach the merits of MAC's allegations, the Commission has the discretion to proceed with this matter and simply request that MAC amend its complaint by submitting affidavits in support of those allegations.

Minnegasco further requested that MAC be required to state why the Formal Complaint was made by MAC rather than the customers cited by MAC in its exhibits. The Department requested that MAC be required to further amend its complaint to supply evidence that customers received unfair preference or disadvantage to their utility service after Minnegasco's recent revision of its internal guidelines on sales and service practices.

The Commission does not believe that pursuit of the merits in this matter calls for the additional requirements proposed by Minnegasco and the Department. The Department's request simply underscores a consideration relevant to determining what relief, if any, is appropriate after a finding by the Commission that MAC's allegations are true. In that regard, it would be equally incumbent upon Minnegasco to show that revision of its internal guidelines is an adequate response to the concern regarding unfair preferences or disadvantages.

C. Appropriate Process

The Department recommended that the Commission dismiss MAC's complaint because all MAC's concerns will be properly addressed in the Commission's investigation, Docket No. G,E-999/CI-90-1008 (the 1008 Docket). Minnegasco argued that the current docket (the 942 Docket) was unnecessary because the concerns raised by MAC either had already been resolved as part of the 1008 Docket or could be resolved by that docket and the company's upcoming rate case.

In reviewing the progress in the 1008 Docket, the Commission finds that, contrary to Minnegasco's assertion, none of MAC's

allegations of improper activity have been resolved. Moreover, in the 1008 Docket, Commission Staff is working with gas and electric companies, on an individual basis, to improve their accounting procedures to guard against the kind of cross subsidization complained of by MAC. As such, the 1008 Docket is not the best vehicle for addressing MAC's specific allegations of wrongdoing by Minnegasco.

As to Minnegasco's proposal to resolve MAC's remaining concerns in its upcoming rate case, the Commission is unwilling to place these issues on hold pending Minnegasco's filing of its next rate case. The Commission prefers to proceed in this matter at once. Nothing is served by delay and the statutory 10 month period allowed for resolution of a rate case may be insufficient to deal thoroughly with the issues raised in MAC's complaint.

The Commission shares the concerns of the parties to avoid unnecessary duplication of effort to resolve these matters. Therefore, the Commission will remove Minnegasco from among the gas companies investigated in the 1008 Docket and consolidate the concerns regarding Minnegasco in this current 942 Docket.

The Commission is not prepared to conclude that a contested case proceeding is required in this matter. The Commission will not refer the matter to the Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ) at this time. Before resorting to expensive contested case proceedings, the Commission finds it prudent to allow a period of fact development during which the matter may be resolved. At a minimum, discovery and discussion between the parties will clarify the issues that must be referred for contested case hearing. Some disputes will be avoided and any that remain will be narrowed, thereby minimizing the expenses of a contested case.

To facilitate the Commission's examination of the issues raised in MAC's complaint, the Commission will grant MAC's request to conduct discovery in this matter. The complaint is heavily fact based and involves unregulated activity where the experience of MAC will be particularly helpful in developing the record for the Commission. MAC's efforts on behalf of its own complaint, of course, will supplement rather than supplant the work of the Department and the RUD-OAG in exercise of their responsibilities on behalf of the ratepayers in this matter.

The Commission recognizes that Minnegasco may have concerns about any party, particularly a competitor such as MAC, gaining access to proprietary material. To address legitimate concerns, the Commission will issue a Protective Order that MAC will be required to sign before gaining access to such material. The Commission prefers that Minnegasco and MAC stipulate to a Protective Order within 10 days of this Order. However, if they are unable to agree upon such an Order, the parties should file

proposed Orders for the Commission's consideration, also within 10 days of this Order.

At the conclusion of the 90 day fact development period, MAC will file a report presenting any findings of statute or rule violations. Interested persons will have 30 days after the filing of this report to file comments.

ORDER

1. Minnegasco is hereby severed from Docket No. G,E-999/CI-90-1008. All concerns regarding Minnegasco that were formerly addressed in the 1008 Docket are consolidated into the current complaint docket G-008/C-91-942.
2. The Minnesota Alliance for Competition (MAC) shall have discovery rights in this matter contingent upon and subject to a Protective Order to be issued in this matter.
3. Within 10 days of the date of this Order, MAC and Minnegasco shall file with the Commission a stipulated Protective Order.

If MAC and Minnegasco are unable to stipulate to such an Order, each shall file a proposed Protective Order with the Commission within 10 days of this Order.

4. Within 90 days of the issuance of the Protective Order by the Commission, MAC shall file with the Commission and serve upon the parties a report including any findings of statute or rule violations.
5. Within 30 days of the filing of MAC's report, interested parties may file comments regarding the report.
6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)